



ENVIRONMENTAL
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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

Washington State

I. Overview

Washington State wetlands law and regulation is a true patchwork that has evolved from various historical events, political movements, and local, state and tribal, and federal influences. These factors have produced a multifaceted state approach to wetlands regulation, management, and protection. The state has passed numerous laws that affect wetlands and involve different state agencies. While much of the focus lies on empowering local municipalities to oversee land use and development and to regulate wetlands locally, the state also plays many active roles in regulating wetlands.

The state's primary role in wetlands regulation and protection involves filling gaps in federal jurisdiction over wetlands by using authorities in the state Water Pollution Control Act. Washington's Growth Management Act also plays a significant role in wetlands regulation through its requirement for local governments to protect critical areas, which include wetland habitats.¹ The state also plays a significant role in assisting local governments in the development of comprehensive growth management plans, shoreline master programs, and regulations and ordinances.

II. Regulatory Programs

Wetland definitions and delineation

The Washington State Water Pollution Control Act defines state waters without explicit reference to wetlands, stating “‘waters of the state’ ... shall be construed to include lakes, rivers, ponds, streams, inland waters, under ground waters, salt waters, and all other surface waters and water courses within the jurisdiction of the state of Washington.”² However, a 1993 Superior Court decision made clear that this definition includes wetlands, ruling that all wetlands “bigger than puddles” are included as “waters of the state.”³ Amendments to state water quality standards adopted in 1997 made the inclusion of wetlands more explicit, stating that “surface waters of the state include lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands, and all other surface waters and water courses within the jurisdiction of the state of Washington.”⁴

Washington's water quality provisions define “wetlands” as:

areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that

¹ Personal communication with Richard Doenges, Washington Department of Natural Resources (Jun. 8, 2007).

² WASH. REV. CODE § 90.48.020.

³ See *Building Industries Associates of Washington v. City of Lacey*, No. 91-2-02895-5. (Thurston County Super. Ct. 1993).

⁴ WASH. ADMIN. CODE § 173-201A-010(2).

were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.⁵

State wetland delineation criteria reference the U.S. Army Corps of Engineers' 1987 *Wetlands Delineation Manual*.⁶ In fact, the 1995 Washington State Legislature enacted a bill requiring the Department of Ecology to adopt a wetland delineation manual that "implements and is consistent with the [1987 Corps Manual]."⁷ The *Washington State Wetlands Identification and Delineation Manual* was completed in March 1997. The document is intended for use "in determining wetland areas when applying state and local government regulations..."⁸

Wetland-related law and regulation

The State of Washington provides wetlands protection under numerous state laws, none of which provide wetlands protection as their primary purpose: State Water Pollution Control Act;⁹ Growth Management Act;¹⁰ Shoreline Management Act;¹¹ State Hydraulic Code;¹² and Forest Practices Act.¹³ In general, the state emphasizes a local approach to wetlands protection and regulation. Most state laws authorize local municipalities to plan and regulate their lands, including wetlands, with state agencies often playing an advisory role. The largest state role in regulation falls under the water quality provisions of the State Water Pollution Control Act, described below; however, the most influential wetland-related regulation in the state comes at the local level, as land use management is generally perceived as the most effective mechanism for protecting wetland functions and values.¹⁴

*State Water Pollution Control Act.*¹⁵ The State Water Pollution Control Act (SWPCA) was passed in 1945 to protect water quality, wildlife, and public health. The act is administered by the Department of Ecology ("Ecology") and includes state surface and groundwater quality standards, an anti-degradation policy, sediment management provisions, and permitting and certification requirements. SWPCA implements parts of the Clean Water Act (CWA) such as National Pollutant Discharge Elimination System permit requirements and §401 water quality certifications.¹⁶

Of the provisions of SWPCA, the state surface water quality standards and antidegradation policy are the most relevant in state wetland regulation and encompass the state's most

⁵ *Id.* § 173-201A-020.

⁶ U.S. ARMY CORPS OF ENGINEERS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (1987), available at <http://www.saj.usace.army.mil/permit/documents/87manual.pdf>.

⁷ WASH. REV. CODE § 90.58.380, available at <http://apps.leg.wa.gov/rcw/>.

⁸ WASHINGTON STATE DEPARTMENT OF ECOLOGY, ECOLOGY PUBLICATION NO. 96-94, WASHINGTON STATE WETLANDS IDENTIFICATION AND DELINEATION MANUAL (1997), available at <http://www.ecy.wa.gov/pubs/9694.pdf>.

⁹ WASH. REV. CODE § 90.48; WASH. ADMIN. CODE § 173-201A.

¹⁰ WASH. REV. CODE § 36.70A; WASH. ADMIN. CODE § 365-190.

¹¹ WASH. REV. CODE § 90.58; WASH. ADMIN. CODE § 173-22; § 173-27; § 173-26.

¹² WASH. REV. CODE § 77.55; WASH. ADMIN. CODE § 220-110.

¹³ WASH. REV. CODE § 76.09; WASH. ADMIN. CODE § 222.

¹⁴ Personal communication with Andy McMillan, Washington State Department of Ecology (Jan. 14, 2004).

¹⁵ WASH. REV. CODE § 90.48; WASH. ADMIN. CODE § 173-201A.

¹⁶ WASHINGTON STATE DEPARTMENT OF ECOLOGY, WETLAND REGULATIONS GUIDEBOOK (1994), available at <http://www.ecy.wa.gov/biblio/8805.html>. (Publication now out of print and unavailable – link to ordering info.)

prominent role in the protection and regulation of Washington wetlands.¹⁷ However, this law only regulates direct impacts to wetlands, such as filling or stormwater discharge. Protection of wetland functions through the use of buffers and methods of land use management is accomplished at the local level.¹⁸ However, the law does regulate all wetlands, including those that fall outside federal jurisdiction under the CWA.

*Growth Management Act.*¹⁹ The Washington State legislature passed the Growth Management Act (GMA) in 1990 to address the problem of uncoordinated and unplanned growth. The GMA relies on a “bottom up” planning process that requires local municipalities to adopt development regulations based on the best available science.²⁰ However, state resource agencies and tribes have an influential role in determining the technical standards for the regulations.²¹

Under the GMA, local governments must designate and protect “critical areas,” including wetlands and fish and wildlife conservation areas.²² Goals of the act guide the development and adoption of comprehensive plans and development regulations for the cities and counties of the state. All cities and counties in the state require permits for activities in or near designated critical areas. Incentive and acquisition programs designed to protect wetlands are common among local governments as well.²³

It should be noted that the GMA gives planning authority to local municipalities and counties—not the state. However, the Washington Department of Community, Trade, and Economic Development is charged with providing guidance for cities and counties in making critical area designations and designing programs to protect their functions.²⁴ Ecology’s Shorelands and Environmental Assistance (SEA) program also provides review of Critical Areas Ordinance updates to ensure that development regulations and ordinances provide adequate wetland protection.²⁵

*Shoreline Management Act.*²⁶ Recognizing the importance and fragility of the state’s shoreline areas, the state legislature passed the Shoreline Management Act (SMA) in 1971.²⁷ “Shoreline areas” include all marine waters and their associated wetlands²⁸ (together with the lands

¹⁷ McMillan, *supra* note 14.

¹⁸ Personal communication with Andy McMillan, Washington State Department of Ecology (Nov. 6, 2004).

¹⁹ WASH. REV. CODE § 36.71A; WASH. ADMIN. CODE § 365-190.

²⁰ WASH. REV. CODE § 36.70A.172.

²¹ Doenges, *supra* note 1.

²² WASH. REV. CODE § 36.70A.172.

²³ WASHINGTON STATE DEPARTMENT OF ECOLOGY, *supra* note 16.

²⁴ WASH. ADMIN. CODE § 365-190. *See also* STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT, CRITICAL AREAS ASSISTANCE HANDBOOK, PROTECTING CRITICAL AREAS WITHIN THE FRAMEWORK OF THE WASHINGTON GROWTH MANAGEMENT ACT (2003), *available at* <http://www.cted.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&alias=CTED&lang=en&ItemID=976&Mid=944&wversion=Staging>.

²⁵ Personal communication with Stephen Stanley, Department of Ecology (Jun. 7, 2007).

²⁶ WASH. REV. CODE § 90.58; WASH. ADMIN. CODE § 173-22; § 173-27; § 173-26 (pending).

²⁷ ANDY McMILLAN, WASHINGTON STATE DEPARTMENT OF ECOLOGY, HOW ECOLOGY REGULATES WETLANDS (1998), *available at* <http://www.ecy.wa.gov/pubs/97112.pdf>.

²⁸ “Associated wetlands” means “those wetlands which are in proximity to and either influence or are influenced by tidal waters or a lake or stream subject to the SMA.” Washington State Department of Ecology, *supra* note 16.

underlying them), all lakes and reservoirs equal to or greater than 20 acres in size and their associated wetlands, and all streams and river segments with a mean annual flow greater than 20 cubic feet per second and their associated wetlands.²⁹ Approximately 30 percent of the state's freshwater wetlands and all of the tidal wetlands are under SMA jurisdiction; thus, the act is significant to the state's wetland protection strategy.³⁰

Another locally-focused statute, the SMA requires local governments to prepare shoreline master programs for all shorelines within their jurisdiction.³¹ Local governments are the regulating authority under the SMA and are responsible for issuing permits for substantial development, conditional uses, and variances that are in conformance with the local shoreline master program.³² However, the Department of Ecology is involved in SMA regulation in three ways. First, Ecology is responsible for determining which wetlands are within the jurisdiction of the law.³³ Second, the agency has authority to review and either approve or appeal certain local government permitting decisions (e.g., conditional use permits).³⁴ In its review of these permits, Ecology considers the language in the local shoreline master program, the policies of the SMA, and its understanding of the project impacts to the wetland.³⁵ Third, the agency is involved in the development and approval of local shoreline master programs, which contain the goals, policies, and regulations used by cities and counties to guide their shoreline permit decisions. Ecology's recently updated rules establish planning and regulatory standards for future shoreline development and uses, requirements for protection and restoration of shoreline ecological functions within the context of ecosystem-wide processes, and guidance on the limitations of regulatory authority and shorelines and GMA integration.³⁶

*State Hydraulic Code.*³⁷ The State Hydraulic Code regulates construction and other work in state waters with the purpose of protecting fish life in all marine and fresh waters of the state. While not directly aimed at the protection of wetlands, the Hydraulic Code applies to all activities that affect the bed or flow within the ordinary high water line of state waters, which often include wetlands.³⁸ Such activities require a permit called a Hydraulic Project Approval (HPA), which is obtained from the Washington State Department of Fish and Wildlife (WDFW).³⁹ The Department has adopted a set of agency rules to guide its administration of the Code, including a set of wetland protection and restoration policies. These policies include the

²⁹ WASH. REV. CODE § 90.58.030.

³⁰ MCMILLAN, *supra* note 27.

³¹ WASH. REV. CODE § 90.58.080.

³² *Id.* § 90.58.140.

³³ WASH. REV. CODE § 90.58.030(2)(f); WASH. ADMIN. CODE § 173-22.

³⁴ WASH. REV. CODE § 90.58.140(3); WASH. ADMIN. CODE § 173-27.

³⁵ MCMILLAN, *supra* note 27.

³⁶ WASH. ADMIN. CODE § 173-26.

³⁷ WASH. REV. CODE § 77.55; WASH. ADMIN. CODE § 220-110.

³⁸ Jurisdiction extends to the ordinary high water mark, adjacent wetlands that could change the bed or flow of waters of the state, or activities on adjacent uplands that could affect the bed or flow of waters of the state. Generally, wetlands covered under an HPA would include submerged and emergent wetlands below ordinary high water mark and wetlands above ordinary high water mark whose alteration could affect the bed or flow of waters of the state. An HPA is not required for activities affecting isolated wetlands unless it could be clearly demonstrated that their removal would change the bed or flow of streams, lakes, ponds, marine or estuarine areas. Personal communication with Bob Zeigler, Washington State Department of Fish and Wildlife (Sept. 2, 2004).

³⁹ WASH. REV. CODE § 77.55.100 *repealed by* WASH. REV. CODE § 146.1006.

adoption of a “No Net Loss and Long-Term Gain” goal that emphasizes mitigation sequencing, wetland replacement ratios,⁴⁰ wetland buffer recommendations, transfer of development rights, encouragement of restoration⁴¹ and creation, mitigation banking,⁴² monitoring and assessment, and other considerations such as watershed planning and cumulative effects.⁴³

*Forest Practices Act.*⁴⁴ Wetland provisions of the CWA and SWPCA are implemented on state and private forestlands through the Forest Practices Act, which focuses on maintaining functions important to the forest ecosystems of the state. Anyone proposing timber harvest or other classes of “forest practices” must submit a forest practices application to the Washington State Department of Natural Resources (WDNR).⁴⁵ Protection measures are specific to forested and non-forested wetlands. For forested wetlands, provisions restrict harvest timing (dry periods only) and methods (low ground disturbance). Non-forested wetlands must be classified and wetland management zones must be created to protect wetland functions in the forest landscape.⁴⁶ Wetland management zones are based on wetland size categories of one-quarter to one-half acre, one-half acre to five acres, and greater than five acres.⁴⁷

Although WDNR is the permitting agency, other state and local agencies may be involved. For example, as with HPAs, Ecology is authorized to take action regarding water pollution through the state’s water quality laws. Additionally, WDFW also may be involved through administration of the State Hydraulic Code. Finally, local governments who have established a memorandum of agreement have authority on lands to be converted to non-forestry uses, as well as lands platted after 1960.⁴⁸

Organization of state agencies

Under the State Water Pollution Control Act, Growth Management Act, Shoreline Management Act, State Hydraulic Code, and Forest Practices Act, four state agencies play some role in state wetland regulation in addition to local municipalities—the Departments of: Ecology; Natural Resources; Fish and Wildlife; and Community, Trade, and Economic Development.

Department of Ecology. The Washington State Department of Ecology is the lead agency for wetland activities in the state, managing §401 water quality certification and providing technical

⁴⁰ Prescribed wetland replacement ratios are: 1:1 (restored to impacted) if the mitigation site is fully functional prior to impact; 2:1 if compensation is concurrent; and greater than 2:1 if the project involves sensitive wetlands, difficult-to-replace wetlands, sub-basins with greater than ten percent impervious surface, or temporal and geographic losses in replacement.

⁴¹ Strategies include encouraging restoration through landowner incentive programs such as the Natural Resources Conservation Service’s Wetland Reserve Program, WDFW acquisition or cooperation with land trusts, and the transfer of development rights.

⁴² When developing or regulating mitigation banks, unavoidable impacts to resources should be compensated for in the following order: on site; within the same sub-basin, or in the same Water resource Inventory Area, unless the WDFW determines that greater habitat function could be provided through other methods.

⁴³ Washington State Department of Fish and Wildlife, *Protecting and Restoring Wetlands, Policy 5211* (on file with author).

⁴⁴ WASH. REV. CODE § 76.09; WASH. ADMIN. CODE § 222.

⁴⁵ WASH. REV. CODE § 76.09.050.

⁴⁶ WASH. ADMIN. CODE § 222-16-035.

⁴⁷ McMillan, *supra* note 27.

⁴⁸ Doenges, *supra* note 1.

assistance and guidance to local governments and the regulated community. The primary wetlands group within Ecology is the Shorelands and Environmental Assistance (SEA) Program. Although Ecology does have a separate Water Quality Program, the group generally does not deal directly with wetlands.⁴⁹

The SEA Program evolved from a variety of separate programs. In the early 1980s, Washington State did not have any regulatory authority to protect wetlands beyond what was provided at the federal level. Federal agencies began encouraging states to use water quality laws for these purposes, and in the late 1980s, the U.S. Environmental Protection Agency provided funding to the state to develop a §401 water quality certification program.⁵⁰

The Shorelands Program also began to develop in the 1980s. In 1983, the National Oceanic and Atmospheric Administration provided Ecology with some funding for a wetlands program under the SMA, offering additional protection measures to about half of the state's wetlands. In 1990, SMA wetlands programs began to combine with GMA regulations, under which, again, cities and counties provide regulatory measures with state guidance. All local municipalities have adopted regulatory measures, but approaches and stringency vary across the state.⁵¹

The SEA Program has 20 staff, 9 of which are located in the state's 4 regional offices. Regional staff duties include issuing §401 certifications, offering consultation for shoreline permits involving wetlands, and providing technical assistance to regulating local municipalities. Eleven SEA Program wetland staff work at the state headquarters on various activities, including policy development, regulatory work, work with the legislature, regulation revision, and the issuance of policy guidance, among other activities. One staff position is dedicated solely to wetland stewardship (e.g., working with landowners and other agencies on wetland preservation and restoration through non-regulatory means and coordinating with federal and local programs on funding and other related issues). Staff also conduct research and development. New tools and approaches for assessing wetlands at the watershed scale and technical tools, such as hydrogeomorphic (HGM) assessment, are under development. Four positions, funded under CWA §104, are dedicated to evaluating mitigation in the state and developing a wetland mitigation and compliance monitoring program. The SEA Program also conducts some enforcement, monitoring, and restoration activities.

The SEA Program's annual budget fluctuates from year to year, but has been shrinking in recent years.⁵² In fiscal year 2003, \$12.4 million was budgeted for operations, while \$8.2 million in grants were given to local groups.⁵³ Program funding is derived from general state

⁴⁹ McMillan, *supra* note 14.

⁵⁰ *Id.*

⁵¹ In the mid-1990s, the business community began to express difficulty in complying with such varying measures. Although there was discussion of the adoption of a statewide rule, one was never developed. Instead, a rule was adopted requiring local governments to use "best available science" in making regulatory provisions and planning. This measure increased the influence of Ecology in local wetlands regulation because the agency is an often used source of best available science. McMillan, *supra* note 14.

⁵² McMillan, *supra* note 14.

⁵³ Personal communication with Andy McMillan, Washington State Department of Ecology (Jan. 22, 2004).

appropriations, some dedicated appropriations, federal grants, and funds from other state agencies.⁵⁴

Department of Fish and Wildlife. The Washington State Department of Fish and Wildlife and its parent agencies have had varying involvement in wetlands issues in the state over the last century. In 1947, the Washington Department of Game and the Department of Fisheries (the predecessor of the current WDFW) began jointly administering permits to protect fish life (Hydraulic Project Approvals).⁵⁵ However, despite a priority on wetlands protection by staff habitat biologists, the agency's involvement with wetlands through the years has been reduced by a variety of influences.⁵⁶

In 2001, WDFW eliminated its wetland section in a two percent budget cut.⁵⁷ Presently, agency staff are involved in wetland issues indirectly. For example, area habitat biologists investigate Hydraulic Project Approvals under the State Hydraulic Code for effects on state waters, which include wetlands. The WDFW has also acquired some wetland parcels and restored some estuarine wetlands on agency land with monies from the state's duck stamp. Some staff serve on transportation mitigation project subcommittees, occasionally provide comment on Corps permit notices, and get involved with local wetland issues, but little is required legally.⁵⁸

Because agency staff activities do not include work directly related to wetlands, it is difficult to track the number of full-time equivalents (FTEs) or funding allocated to working on wetlands issues in the agency. Many area habitat biologists have seen a vast reduction in the amount of wetlands-related work over the past decade.⁵⁹

Department of Natural Resources. The Washington State Department of Natural Resources is separated into regulatory and non-regulatory divisions. While the regulatory part of the agency deals mostly with the forest industry, it also addresses wetland-related issues through the Forest Practices Act.⁶⁰ Under the FPA, WDNR requires environmental compliance on all agency lands, including requiring all lessees to have environmental permits such as Hydraulic Project Approvals, §401 certifications, and other wetland-related permits.⁶¹

The non-regulatory part of the WDNR operates in a proprietary manner, overseeing both uplands and aquatic lands. Uplands are managed consistently with regulatory requirements primarily to generate revenue for trust beneficiaries. Some wetlands have been designated as "special natural areas" or "natural area preserves" and are managed to maintain their unique environmental conditions. The WDNR manages over 2.5 million acres of aquatic lands in the state, again playing a largely proprietary role by leasing lands for various uses.⁶² Specifically, WDNR works to manage aquatic lands for the public benefit and to balance public benefits. Activities

⁵⁴ McMillan, *supra* note 14.

⁵⁵ Personal communication with Bob Zeigler, Washington State Department of Fish and Wildlife (Jan. 7, 2004).

⁵⁶ *Id.*

⁵⁷ Personal communication with Bob Zeigler, Washington State Department of Fish and Wildlife (Jan. 6, 2004).

⁵⁸ Zeigler *supra* note 55.

⁵⁹ Personal communication with Bob Zeigler, Washington State Department of Fish and Wildlife (Jan. 8, 2004).

⁶⁰ Personal communication with Loren Stern, Washington State Department of Natural Resources (Sept. 15, 2004).

⁶¹ WASHINGTON STATE DEPARTMENT OF ECOLOGY, *supra* note 16.

⁶² Personal communication with Loren Stern, Washington State Department of Natural Resources (Jan. 5, 2004).

include: encouraging direct public use and access; fostering water-dependent uses; ensuring environmental protection; utilizing renewable resources; and generating revenue (when consistent with the other public benefits).⁶³ It is important to note that aquatic lands, defined as navigable waters, do not often include what are considered to be traditional wetlands, but can sometimes include wetland areas, especially when associated with tidelands and shorelands, and are frequently adjacent to wetlands.⁶⁴

Department of Community, Trade, and Economic Development. The Washington State Department of Community, Trade, and Economic Development (CTED) administers the state's Growth Management Service Program. The program provides technical assistance to local governments and citizens on land use planning and implementation of the GMA, including the designation and protection of critical areas and their functions and values. Critical areas include wetlands, fish and wildlife conservation areas, and geologically unstable areas, including tsunami-prone areas, earthquake areas, floodplains and flood-prone areas, and critical aquifer recharge areas. CTED, along with other state agencies, also reviews critical area ordinances in draft form (the GMA requires 60-day submittal notice before adoption can take place) and provides technical assistance and formal comment. If approved to do so by the Governor's office, CTED and other state agencies can also appeal ordinances if they are found to be out of compliance with the GMA.⁶⁵

The agency does not have field or regional offices, but staff planners are assigned to local municipalities to provide technical assistance on land use planning and implementation of the GMA. In all, 14 planners are assigned to 36 counties in the state.⁶⁶ While wetlands are not the sole focus of CTED planners' activities, all planners will work with wetlands issues to some degree. Agency funding for these purposes comes mostly from general state appropriations and federal grants, with most monies allocated to grant and loan programs for local governments.⁶⁷

§401 certification

Section 401 certification is the primary mechanism of wetlands regulation at the state level, although local government regulation is the primary mechanism in the state overall.⁶⁸ For activities that fall outside the purview of the §401/404 program, the state may use other state water quality permitting processes such as wastewater discharge permits, short-term water quality modifications, and administrative orders (an enforcement rule).⁶⁹ In fact, the state has announced that any project that calls for filling or altering a wetland determined by the Corps to be "isolated" will still be subject to regulation by the state via administrative order.⁷⁰ While

⁶³ Washington Department of Natural Resources, *State-Owned Aquatic Lands Managed for all the People of Washington*, at <http://www.dnr.wa.gov/htdocs/aqr/> (last visited July 31, 2007).

⁶⁴ Personal communication with Loren Stern, Washington State Department of Natural Resources (Jan. 5, 2004).

⁶⁵ Personal communication with Chris Parsons, Washington Department of Community, Trade and Economic Development (Jan. 27, 2004).

⁶⁶ Washington State has 36 counties, but only 26 are growing at a rate fast enough to require these actions under the GMA.

⁶⁷ Parsons, *supra* note 65.

⁶⁸ McMillan, *supra* note 14.

⁶⁹ See McMillan, *supra* note 27.

⁷⁰ Washington State Department of Ecology, *Focus Sheet: Isolated Wetlands – Changes in the Regulatory Process*, Ecology Publication No. 00-06-020 (June 2001), available at <http://www.ecy.wa.gov/pubs/0106020.pdf>.

these wetlands are exempt from §401/404, they are still included in the state's definition "wetlands." The order is used for "isolated" wetlands to ensure compliance with state law, requiring mitigation and other regulatory measures.⁷¹

An average of 75 to 100 §401 certifications are issued in any given year, including certifications for wetland and in-stream activities. Most certification decisions are approved; few are waived or denied outright. Denials are mostly based on whether or not regional and federal criteria have been met.⁷² Ecology staff rely on a combination of quantitative and qualitative assessment and best professional judgment in making §401 certification decisions, depending on the type of wetland and the extent of the proposed impact.⁷³

Nationwide permits

Washington has reviewed and applied various conditions to selected U.S. Army Corps of Engineers' 2002 nationwide permits (NWP), while others have been partially denied or denied altogether.⁷⁴ Regional conditions that apply to multiple, or all, NWPs include:

- Non-application in mature forested wetlands or bog and bog-like wetlands;⁷⁵
- Allowance of authorized inspections by Corps representatives;
- Non-application in the Commencement Bay Study Area;⁷⁶
- Within the boundaries of the Mill Creek Special Management Area, application of NWPs applies only in those areas designated as "Developable Wetlands;"⁷⁷

⁷¹ McMillan, *supra* note 14.

⁷² Personal communication with Loree Randall, Washington State Department of Ecology (Jan. 20, 2004).

⁷³ McMillan, *supra* note 14.

⁷⁴ The following NWPs have been approved: NWP#4 - Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities; NWP#5 - Scientific Measurement Devices; NWP#6 - Survey Activities; NWP#15 - U.S. Coast Guard Approved Bridges; NWP#19 - Minor Dredging; NWP#20 - Oil Spill Cleanup; NWP#22 - Removal of Vessels; NWP#30 - Moist Soil Management; NWP#31 - Maintenance of Existing Flood Control Facilities. The following NWPs have been partially denied: NWP#3 - Maintenance; NWP#7 - Outfall Structures and Maintenance; NWP#12 - Utility Activities; NWP#13 - Bank Stabilization; NWP#14 - Linear Transportation Projects; NWP#18 - Minor Discharges; NWP#23 - Approved Categorical Exclusions; NWP#25 - Structural Discharges; NWP#27 - Stream and Wetland Restoration Activities; NWP#29 - Single-Family Housing; NWP#32 - Completed Enforcement Actions; NWP#33 - Temporary Construction, Access, and Dewatering; NWP#34 - Cranberry Production Activities; NWP#36 - Boat Ramps; NWP#38 - Cleanup of Hazardous and Toxic Wastes; NWP#39 - Residential, Commercial, and Institutional Developments; NWP#40 - Agricultural Activities; NWP#42 - Recreational Facilities. The following NWPs have been denied: NWP#16 - Return Water From Upland Contained Disposal Areas; NWP#17 - Hydro Power Projects; NWP#21 - Surface Coal Mining Activities; NWP#37 - Emergency Watershed Protection and Rehabilitation; NWP#41 - Reshaping Existing Drainage Ditches; NWP#43 - Stormwater Management Facilities. See Final Notice for Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002).

⁷⁵ This regional condition does not apply for NWP#3 - Maintenance; NWP#20 - Oil Spill Cleanup; NWP#32 - Completed Enforcement Actions; and NWP#40 - U.S. Department of Agriculture Program Participant. *Id.*

⁷⁶ This condition applies only to: NWP#12 - Utility Line Activities, NWP#13 - Bank Stabilization, NWP#14 - Linear Transportation Crossings, NWP#23 - Approved Categorical Exclusions, NWP#29 - Single-Family Housing, NWP#39 Residential, Commercial, and Institutional Developments, NWP#40 - Agricultural Activities, NWP#41 Reshaping Existing Drainage Ditches, NWP#42 - Recreational Facilities, and NWP#43 - Stormwater Management Facilities. *Id.*

⁷⁷ This condition applies only to: NWP#14- Linear Transportation Crossings; NWP#23 - Approved Categorical Exclusions; NWP#29 - Single-Family Housing; NWP#33 - Temporary Construction, Access and Dewatering; NWP#39 - Residential, Commercial, and Institutional Developments; NWP#40 - Agricultural Activities; NWP#41 -

- Various construction activity prohibitions to protect bald eagles.

Washington's action on the 2007 NWP's could not be reviewed within the reporting period.

Mitigation

In 1996, the state legislature passed the Aquatic Resources Mitigation Act which states that "it is the policy of the state to authorize innovative mitigation measures by requiring state regulatory agencies to consider mitigation proposals for infrastructure projects that are timed, designed, and located in a manner to provide equal or better biological functions and values compared to traditional on-site, in-kind mitigation proposals."⁷⁸ The *State of Washington Alternative Mitigation Policy Guidance for Aquatic Permitting Requirements from the Departments of Ecology and Fish and Wildlife*, published in 2000, provides interagency policy guidance for evaluating aquatic mitigation alternatives. The guidance is intended to represent consensus on mitigation policy among the agencies responsible for evaluating, approving, implementing, and enforcing aquatic resource mitigation.

In March 2006, Ecology, in cooperation with the EPA and the Corps, published *Wetland Mitigation in Washington Part 1: Agency Policy and Guidance* and *Part 2: Developing Mitigation Plans*. *Part 1* provides information on agency mitigation policies and clear guidance on requirements and expectations for compensatory mitigation specific to wetlands. *Part 2* includes technical information relating to developing mitigation plans.⁷⁹ The Washington Department of Transportation (WDOT) has also published mitigation guidelines, entitled *Success Standards for Wetland Mitigation Projects – A Guideline*.⁸⁰

The 1998 Washington State Legislature passed a wetland mitigation banking law that directed consistency with federal guidance on mitigation banking.⁸¹ The bill provided for two FTEs over two years to develop state regulations for mitigation banking and one FTE after the regulations were adopted.⁸² A draft rule for the certification of mitigation banks was developed and, in November 2001, issued for comment. However, funding cuts have prevented implementation of the rule to date. The proposed rule was withdrawn on May 30, 2002. In June 2002, the wetland mitigation banking program was placed on hold because the staff position that was leading the rulemaking effort was cut due to budget shortfalls.⁸³ In 2004, the Washington Legislature funded a one-year project (fiscal year 2005) to develop a pilot rule and work with banking interests to review mitigation bank proposals under the pilot project. An advisory group picked six banks to participate in the project. During the year-long project, Ecology used the proposed rule guidelines to evaluate the bank proposals, and a Mitigation Banking Review Team was

Reshaping Existing Drainage Ditches; NWP#42 - Recreational Facilities; and NWP#43 - Stormwater Management Facilities. *Id.*

⁷⁸ WASH. REV. CODE § 90.74.

⁷⁹ WASHINGTON STATE DEPARTMENT OF ECOLOGY ET AL., WETLAND MITIGATION IN WASHINGTON STATE – PART 1: AGENCY POLICIES AND GUIDANCE (VERSION 1) (2006), available at <http://www.ecy.wa.gov/pubs/0606011a.pdf>.

⁸⁰ MARY OSSINGER, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, SUCCESS STANDARDS FOR WETLAND MITIGATION PROJECTS – A GUIDELINE (1999), available at <http://pnw.sws.org/forum/success.PDF>.

⁸¹ WASH. REV. CODE § 90.84.

⁸² McMillan, *supra* note 14.

⁸³ Wash. St. Reg. 02-12-058.

developed to provide technical review of these proposals.⁸⁴ In 2007, the legislature extended and increased funding through fiscal year 2009. Ecology hopes to make a final decision on the rule by the end of fiscal year 2008.⁸⁵ The state's business community is a major supporter of mitigation banking, and state staff expect that there will be future initiatives within the state to implement a banking program. While there also exists potential for an in-lieu-fee program of some sort, the state has not formally pursued this option as of yet.⁸⁶

WDOT is collaborating with WDFW and Ecology to develop a "watershed-based mitigation" program to guide mitigation projects for unavoidable impacts resulting from transportation projects. The program focuses on improving ecological benefits to watersheds and streamlining the permitting process.⁸⁷ Through a "watershed characterization" process, the WDOT assesses current conditions in watersheds and identifies possible mitigation sites to maximize ecological benefit to the watershed, achieve locally defined watershed recovery priorities, and reduce mitigation costs. The process involves an interdisciplinary team of scientists who make extensive use of geographic information systems technology. The team generates a list of potential mitigation sites in the impact area's watershed, which is then subjected to a cost-benefit analysis before a final decision on the location of mitigation projects.⁸⁸

Compliance and enforcement

Each state agency is responsible for enforcing its own regulatory program. Ecology enforces the SWPCA and has joint enforcement authority with local municipalities for the SMA. Local governments are responsible for enforcing the GMA, while WDFW and WDNR are responsible for enforcing Hydraulic Project Approvals and the FPA, respectively. WDNR also issues use authorizations for any activity on state-owned aquatic lands, including compensatory mitigation and restoration projects.⁸⁹

Ecology's SEA Program has a small enforcement component and program staff usually play an advisory role for other enforcing groups (e.g., Corps, Ecology's Water Quality Program). Ecology has placed a priority on enforcing provisions that protect "isolated" wetlands because these areas fall outside federal jurisdiction.⁹⁰ Administrative orders and civil penalties of up to \$10,000 per day, per violation may be used.⁹¹ Typically, however, Ecology issues a Notice of Violation to assess the nature of the violation and the reason for its occurrence. Depending on the offender's response and the egregiousness of the violation, an administrative order may be

⁸⁴ Washington Department of Ecology, *Wetland Mitigation Banking Rule Withdrawn*, at <http://www.ecy.wa.gov/programs/sea/wetlands/mitigation/banking/pilot.html> (last visited May 21, 2007).

⁸⁵ Personal communication with Andy McMillan, Washington Department of Ecology (Jul. 1, 2007).

⁸⁶ McMillan, *supra* note 18.

⁸⁷ Washington Department of Transportation, Environmental Services, *Watershed Based Mitigation*, at <http://www.wsdot.wa.gov/Environment/Watershed/mitigation.htm> (last revised 2007).

⁸⁸ RICHARD A. GERSIB, WASHINGTON DEPARTMENT OF TRANSPORTATION, WASHINGTON DEPARTMENT OF ECOLOGY, WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, ENHANCING TRANSPORTATION PROJECT DELIVERY THROUGH WATERSHED CHARACTERIZATION: OPERATIONAL DRAFT METHODS DOCUMENT (2004), *available at* <http://www.wsdot.wa.gov/NR/rdonlyres/691A03E4-0548-4AA7-8682-D5C9A9ED2BA9/0/methods.pdf>.

⁸⁹ Doenges, *supra* note 1.

⁹⁰ McMillan, *supra* note 14.

⁹¹ WASH. REV. CODE § 90.48.144.

issued with a civil penalty. Any issued penalty can be appealed.⁹² Approximately 15 to 20 administrative orders are issued each year, mostly relating to “isolated” wetland permitting.⁹³

Tracking systems

The SEA Program has recently installed a state aquatic resource database in order to track permits, mitigation, enhancement, preservation, enforcement and corrective actions, and other wetland-related categories. The system includes follow-ups and site inspections and gives reminders for benchmarks that wetland projects should have achieved. The system also has the ability to remind staff of necessary follow-up actions. Created in response to a steadily deteriorating and outdated tracking system, the system went online in January 2004.⁹⁴

III. Water Quality Standards

While Washington State has not developed water quality standards specific to wetlands, the state’s water quality standards and anti-degradation policy apply to all ‘waters of the state,’ which include wetlands. Standards are both narrative and chemical and are associated largely with fish and wildlife habitat. Designated uses have not been developed specifically for wetlands either; however, the designated uses that apply to all surface waters of the state include: salmon and trout spawning, noncore rearing, and migration; primary contact recreation; domestic, industrial, and agricultural water supply; stock watering; wildlife habitat; harvesting; commerce and navigation; boating; and aesthetic values.⁹⁵ Protection is not limited to only those uses listed, because the anti-degradation policy makes it clear that all existing beneficial uses of a waterbody are to be protected, not just those listed specifically in the standards.⁹⁶

IV. Monitoring and Assessment

While there is no state standard assessment methodology or monitoring program in place, Ecology has two assessment methodologies for wetlands. The methodologies are mostly used for guidance or in constructing best professional judgment for regulatory decision-making. They are not used for purposes of constructing CWA §303(d) lists or §305(b) reports.⁹⁷

One is a quantitative, HGM-based, functional assessment methodology. However, Ecology has no plans to develop HGM guidebooks for the region.⁹⁸ Working in conjunction with the Corps, Ecology began development of the methodology, which is used mainly for mitigation decision-making, under the *Washington State Wetland Function Assessment Project* in 1997. Ecology developed two sets of methods for assessing wetland functions as part of this assessment project:

⁹² Randall, *supra* note 72.

⁹³ McMillan, *supra* note 14.

⁹⁴ McMillan, *supra* note 85.

⁹⁵ WASH. ADMIN. CODE § 173-201A-600.

⁹⁶ *Id.* § 173-201A-310.

⁹⁷ McMillan, *supra* note 14.

⁹⁸ *Id.*

methods for riverine and depressional wetlands in the lowlands of Western Washington⁹⁹ and methods for depressional wetlands in the Columbia Basin of Eastern Washington.¹⁰⁰ The other assessment methodology, the *Washington State Wetland Rating System*, is designed as a rapid screening tool for use by agencies and local governments in categorizing wetlands for protection and management. The methodology was developed in conjunction with a variety of Washington state and local agencies, and separate systems have been developed for Eastern Washington¹⁰¹ and Western Washington.¹⁰² This rating tool was updated in August 2006 to include a general assessment of wetland functions.¹⁰³ Both rating systems have been widely adopted by local governments as part of recent Critical Areas Ordinance updates.¹⁰⁴ The rating system is by far the most commonly used assessment methodology and is used by federal agencies and most local governments in addition to the state. The system provides quantitative information on three groups of wetland functions: water quantity, water quality, and habitat.¹⁰⁵

The Washington Department of Transportation also uses a qualitative tool based on best professional judgment for rapid documentation of linear projects, called *Wetland Functions Characterization Tool for Linear Projects*.¹⁰⁶

V. Restoration

The Department of Ecology contributes to wetland restoration initiatives apart from those required as compensatory mitigation. With a focus on developing online guidance for local governments, Ecology is taking a landscape approach to wetland mitigation and working with local governments to implement protection and restoration initiatives as part of their comprehensive land use and shoreline planning. The department is establishing a mitigation framework that will include protection and restoration priorities (referred to as “most suitable areas for protection and restoration”). For one pilot project, Ecology is working with Whatcom County in the Birch Bay watershed to develop a watershed-based management plan that meets

⁹⁹ TOM HRUBY ET AL., WASHINGTON STATE DEPARTMENT OF ECOLOGY, METHODS FOR ASSESSING WETLAND FUNCTIONS VOLUME I: RIVERINE AND DEPRESSIONAL WETLANDS IN THE LOWLANDS OF WESTERN WASHINGTON, Ecology Publication No. 99-115 (1999), available at <http://www.ecy.wa.gov/pubs/99115.pdf>.

¹⁰⁰ T. HRUBY & S. STANLEY, WASHINGTON STATE DEPARTMENT OF ECOLOGY, METHODS FOR ASSESSING WETLAND FUNCTIONS VOLUME II: DEPRESSIONAL WETLANDS IN THE COLUMBIA BASIN OF EASTERN WASHINGTON. PART 2: PROCEDURES FOR COLLECTING DATA, Ecology Publication No. 00-06-48 (2000), available at <http://www.ecy.wa.gov/pubs/0006048.pdf>.

¹⁰¹ TOM HRUBY, WASHINGTON STATE DEPARTMENT OF ECOLOGY, WASHINGTON STATE WETLAND RATING SYSTEM FOR EASTERN WASHINGTON - REVISED (2004), Ecology Publication No. 02-06-019, available at <http://www.ecy.wa.gov/pubs/0406015.pdf>.

¹⁰² TOM HRUBY, WASHINGTON STATE DEPARTMENT OF ECOLOGY, DRAFT WASHINGTON STATE WETLAND RATING SYSTEM FOR WESTERN WASHINGTON – REVISED (2004), Ecology Publication No. 04-06-014, available at <http://www.ecy.wa.gov/pubs/0406014.pdf>.

¹⁰³ TOM HRUBY, WASHINGTON STATE DEPARTMENT OF ECOLOGY, WASHINGTON STATE WETLAND RATING SYSTEM FOR WESTERN WASHINGTON – REVISED (2004), Ecology Publication No. 04-06-025, available at <http://www.ecy.wa.gov/pubs/0406025.pdf>; see also HRUBY, *supra* note 101.

¹⁰⁴ Doenges, *supra* note 1.

¹⁰⁵ McMillian, *supra* note 84.

¹⁰⁶ WILLIAM NULL ET AL., WASHINGTON DEPARTMENT OF TRANSPORTATION, WETLAND FUNCTIONS CHARACTERIZATION TOOL FOR LINEAR PROJECTS (2000), available at <http://www.wsdot.wa.gov/NR/rdonlyres/B92BE0D4-9078-4EFC-99DA-3C0EA4805E2F/0/bpjtool.pdf>.

all local, state, and federal concerns and including the national no net loss policy. Additional watershed-based management projects have been initiated in Snohomish and Clark counties.¹⁰⁷ Technical assistance in developing these plans is provided by *Protecting Aquatic Ecosystems: A Guide for Puget Sound Planners to Understand Watershed Processes*, and Ecology publication, and training workshops. The SEA program also provides assistance to local governments that are preparing landscape characterizations as part of their Shoreline Master Program updates.¹⁰⁸ Funding for this initiative is provided through state and federal appropriations.¹⁰⁹

In addition, Ecology works with local partners (cities, counties, conservation districts, diking districts, non-profit groups) to develop non-regulatory restoration projects. The agency plays a significant role in obtaining federal funding for various local restoration initiatives. Ecology also provides technical assistance on project design and monitoring.

VI. Public-Private Partnerships

State staff provide little direct assistance to private landowners. Ecology employs one FTE who works specifically on issues related to land stewardship. However, the focus in Washington State is more on providing technical support and outreach to municipalities, which in turn work directly with local landowners. The state occasionally coordinates with the USDA Natural Resources Conservation Service on individual restoration initiatives, as well as corporations such as Quadrant, Weyerhaeuser, and other timber companies on private restoration projects.¹¹⁰ Finally, state agencies do not generally coordinate with citizen monitoring groups, although there are several operating within the state. Ecology has provided training for these groups in the past, but currently there is no formal support.¹¹¹

VII. Education and Outreach

The Department of Ecology created a strategic plan for outreach and education in the state in the early 1990s, and as a result, several tools and educational materials were developed. SEA Program staff continue to maintain these tools, but there is no plan to continue developing new materials. Materials target K-12 and general public audiences. Numerous curricula and wetland guidebooks (some available in Spanish and English), coloring pages, and posters are distributed for K-12 education. Materials developed for the general public include wetland guidebooks, landowner stewardship guides, and videos. Local governments also receive outreach and education from the SEA Program, mostly in the form of technical assistance and training.¹¹²

¹⁰⁷ Personal communication with Stephen Stanley, Washington State Department of Ecology (May 22, 2007); Personal communication with Stephen Stanley, Washington State Department of Ecology (Jan. 7, 2004).

¹⁰⁸ Stanley, *supra* note 25.

¹⁰⁹ Stanley, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ McMillan, *supra* note 14.

¹¹² Personal communication with Andy McMillan, Washington State Department of Ecology (July 29, 2004).

VIII. Coordination with State and Federal Agencies

Washington agencies coordinate on various issues related to wetlands. For example, Ecology and WDOT have implementation agreements on WDOT requirements for both water quality permits and mitigation banking. As mentioned previously, the administration of the FPA is also shared among multiple state agencies (WDNR, WDFW, and Ecology).¹¹³ WDOT also works with state agencies on its watershed-based mitigation initiative, including Ecology and WDFW.¹¹⁴

A state wetland conservation plan, entitled the *State Wetland Integration Strategy*, was completed in the 1990s. In writing the plan, Ecology staff enlisted a stakeholder input process, but reaching consensus proved very difficult. The plan was utilized for two to three years, but is now considered outdated.¹¹⁵

There is some coordination between the state and federal levels on wetlands issues. For example, Ecology's SEA Program often coordinates with both the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. However, state coordination with the U.S. Fish and Wildlife Service and the Natural Resources Conservation Service is virtually non-existent.¹¹⁶ Tribes in Washington also are involved in both state and federal permit and project reviews where wetlands are directly related to treaty resources such as salmon and wildlife.¹¹⁷

IX. Acronyms and Abbreviations

CTED – Washington State Department of Community, Trade, and Economic Development

CWA – Clean Water Act

Ecology – Washington State Department of Ecology

FTE – Full-time equivalent

GMA – Growth Management Act

HGM – Hydrogeomorphic

HPA – Hydraulic Project Approval

NWPs – Nationwide Permits

RCW – Revised Code of Washington

SEA – Shorelands and Environmental Assistance

SMA – Shoreline Management Act

SWPCA – State Water Pollution Control Act

WAC – Washington Administrative Code

WDFW – Washington State Department of Fish and Wildlife

WDNR – Washington State Department of Natural Resources

WDOT – Washington State Department of Transportation

¹¹³ McMillan, *supra* note 14.

¹¹⁴ WASHINGTON DEPARTMENT OF TRANSPORTATION, *supra* note 79.

¹¹⁵ *Id.*

¹¹⁶ McMillan, *supra* note 14.

¹¹⁷ Doenges, *supra* note 1.